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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CONSOLIDATED GAS COMPANY OF FLORIDA, INC.
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether an administrative agency in making a decision, and a court of appeals in approving that decision, must address a district court's opinion, issued while the administrative proceeding was in rehearing, in which the district court made a factual finding that the agency's conditions created an unreasonable barrier to competition, and that finding irreconcilably conflicts with the administrative agency's ultimate decision.

PARTIES TO PROCEEDING BELOW

In addition to Consolidated Gas Company of Florida, Inc. and the Federal Energy Regulatory Commission, Florida Gas Transmission Company (a subsidiary of Sonat, Inc. and Enron Corp.) was a party in the District of Columbia Circuit proceeding to which this petititon for certiorari is directed.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Petitioner, Consolidated Gas Company of Florida, Inc. (Consolidated) prays that a Writ of Certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the District of Columbia entered in *Consolidated Gas Company of Florida, Inc. v. FERC*, No. 88-1321 (D.C. Cir. March 8, 1989) and the denial of Consolidated's Petition for Rehearing on May 17, 1989. This Petition requests review of the Court's decision approving the Federal Energy Regulatory Commission's (FERC) order requiring that Consolidated pay the cost of construction for a lateral pipeline and meter station connecting Consolidated's system with the Florida Gas Transmission Company (FGT) pipeline, specifically the failure of the Commission and the Court to address the

anti-competitive effect of imposing the cost of construction on Consolidated.

OPINIONS BELOW

The present case involves five agency decisions and three court decisions.

(1) **The Initial Decision of the Administrative Law Judge** —In the initial decision issued on November 21, 1983, 25 FERC ¶ 63,039 (1983), the Administrative Law Judge (ALJ) ruled that Consolidated's connection application should be granted and that FGT should be required to absorb the cost of the lateral line required to connect the FGT pipeline to Consolidated's system. The ALJ found that the FGT tariff did not require a new customer to pay the cost of a new lateral, and thus FGT's tariff did not comply with the Commission's regulation which requires that a tariff include a specific statement that full contribution is required from all customers, if that is the pipeline's policy.[1] The barrier to competition posed by the necessity of obtaining agency authorization for Consolidated to obtain a supply of natural gas, and the Commission's failure to set the application for a prompt hearing, allowed City Gas Company of Florida, Inc. (City Gas) to invade Consolidated's market. The issue of unfair competititon by City Gas was brought to the attention of the ALJ, who ruled:

> Fleisher also testified that the application should be granted so that the Commission does not "aid and abet" the anti-competitive efforts of City Gas (Ex. 1, p. 7, and Ex. 14, pp. 4–5). An acrimonious dispute between Con Gas and City Gas attributable to the loss by Con Gas of its 8 commer-

[1]FERC regulations require an explicit statement in a tariff stating "the company will not build or contribute to the cost of building any sales lateral pipelines to resale customers." 18 CFR 154.39(b)(2). FGT's tariff did not contain such a statement of policy.

> cial customers and 70 residential customers to City Gas culminated in pending litigation in which Con Gas alleges that City Gas has violated the federal antitrust laws. Violation of the policies underlying these federal laws is germane to disposition of a section 7 application.

25 FERC ¶ 63,039 at 65,105 (1983) (citations omitted).

The ALJ recognized the obligation of the Commission to address anti-competitive aspects of agency action. By issuing a prompt decision ordering FGT to provide Consolidated with a supply of gas, and to absorb the cost of the connection into the pipeline's investment rate base, the ALJ opened the door to fair competition.

(2) **The Commission's Initial Decision**—By Opinion and Order No. 225, dated September 20, 1984, the FERC ordered FGT to construct the connection, but the Commission reversed the ALJ's conclusion that FGT should be required to pay for the lateral and ordered Consolidated to reimburse FGT for the full cost of the lateral and meter station to be constructed by FGT. 28 FERC ¶ 61,358 (1984). The Commission denied Consolidated's petition for rehearing in Opinion No. 225-A issued November 19, 1984, 29 FERC ¶ 61,205 (1984).

(3) **The First Appellate Court Decision**—In an unpublished opinion issued March 4, 1986, the United States Court of Appeals for the District of Columbia Circuit vacated the FERC orders, and remanded the case to the FERC for an explanation of the condition imposed on Consolidated. *Consolidated Gas Company of Florida v. FERC*, No. 85-1040 (D.C. Cir. March 4, 1986).

(4) **The Commission's Decision on Remand**—In response to the remand, on March 30, 1987, the FERC issued Order 225-B, in which it summarily reaffirmed the condition in its initial order. 38 FERC ¶ 61,137 (1987). In its Application for Rehearing filed April 29, 1987, Consolidated again asserted that the Commission had failed to recognize the anti-competitive impact of its order on Consolidated and that to pay the cost of the lateral, when Consolidated's competitor, City Gas, had received numerous laterals at FGT's expense, would seriously jeopardize Consolidated's ability to compete with City Gas and to recover the residential and commercial customers taken over by City Gas while the FERC had blocked Petitioner's access to a natural gas supply. (JA 167, 171-2).

(5) **The United States District Court Decision**—On July 24, 1987 the United States District Court for the Southern District of Florida, in a separate but related antitrust action, found that the Commission's order requiring Consolidated to pay for the cost of a direct connection to the FGT system was anti-competitive. *Consolidated Gas Company of Florida v. City Gas Company of Florida,* 665 F.Supp. 1493 (S.D.Fla. 1987), *appeal docketed,* No. 87-6108 (11th Cir. Dec. 30, 1987). The district court stated:

> during 1984, City Gas began providing service to seven commercial accounts in a shopping center adjacent to Consolidated's service area. Thus, it **became crucial that Consolidated convert to natural gas for as low a cost as possible in order to be able to offer rates that were competitive with those City Gas could offer.** In order to compete effectively, Consolidated believed it was imperative that FGT provide Consolidated with a first connection to the natural gas pipeline at FGT's cost.

> The amortization of the estimated $250,000 capital cost of this lateral pipeline would have increased Consolidated's cost of securing natural gas by approximately five cents per therm. [Tr. 6-91-92]. City Gas has already received approximately ten such connections with FGT at no cost and thus it did not have similar expenses driving up its natural gas rates [Tr. 5-187-188].
>
> Faced with these problems, Consolidated was left with three potential courses of action if it was going to remain in business: (1) obtain a FERC allocation and hope it could convince FGT to pay for the lateral pipeline connection; (2) connect a pipeline to City Gas' pipe and purchase gas directly from City Gas; or, finally (3) obtain a FERC allocation, connect a pipeline to City Gas' pipe, and pay City Gas the cost of transporting gas through City Gas' pipes. Two of these courses of action required Consolidated to deal directly with its future competitor, and **the third alternative, as the facts reveal, involved unreasonable delays and uneconomically high expenses.**

Id. (emphasis added).

> We also find, significantly, that City Gas had monopoly power due to the presence of high barriers to entry. **Costs and delays imposed by the regulatory process are important barriers to entry.**

Id. at 1520 (emphasis added).

> First City Gas, a monopolist, controlled an essential facility—a pipeline that transported wholesale gas. Prior to 1984, when Consolidated received a FERC allocation, Consolidated could

not have purchased wholesale gas from anyone except City Gas. **After 1984, Consolidated could have purchased from** City Gas or **FGT, but would have encountered a prohibitive transportation problem if it had chosen the latter. A lateral pipeline connecting Consolidated facilities to the FGT main would have cost $250,000, or approximately five cents per therm. There is grave doubt as to whether Consolidated could have effectively competed with City Gas based on these additional expenses,** and there is also a serious question as to whether the FPSC would have approved such an increased cost based on an uneconomical duplication of City Gas' existing line.

This concern leads us to the second part of the **MCI Communications Corp.** test—whether Consolidated could practicably or reasonably duplicate the essential facility. In the AT&T line of cases, duplication of the local exchange facilities would obviously be much more expensive than duplication of City Gas' lateral pipe. In *Otter Tail*, a case which is factually more similar to this case than are the AT&T cases, however, the Court did not even suggest that the municipalities should attempt to duplicate the electric transmission lines. Although the Court did not indicate the cost involved, we believe this to be highly supportive of a finding that such facilities cannot be reasonably duplicated. In *Aspen Skiing Co.*, the Tenth Circuit found that duplication was unreasonable "due to regulatory restrictions, and delays, and the expense and time required." 738 F.2d at 1521. The same is true here.

> **Consolidated should not have had to wait two years to get FERC approval for a natural gas allocation. Additionally, it would have been unreasonable to require Consolidated to spend $250,000, which would potentially have made it uncompetitive with City Gas, to duplicate City Gas' lateral pipe.** "To be 'essential' a facility need not be indispensable; it is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants." *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977), cert. denied, 436 U.S. 956, 98 S.Ct. 3069, 57 L.Ed.2d. 1121 (1978) (footnote omitted). We find that such duplication would have been impractical and unreasonable and would have severely, if not fatally, handicapped Consolidated's potential entry into the natural gas market.

Id. at 1534 (emphasis added).

(6) **The Commission's Final Decision**—The FERC denied Consolidated's Petition for Rehearing on March 2, 1988 in Opinion No. 225-C, 42 FERC ¶ 61,271 (1988), and refused to address the anti-competitive aspect of the order. Because the district court's decision was issued after Consolidated's Petition for Rehearing was filed, and the Commission's Rules of Practice do not authorize filings after a Petition for Rehearing has been filed, the district court's decision was not formally before the Commission, but copies of that decision were provided to the Commission's Staff, at the Staff's request, shortly after its issuance in July, 1987.

(7) **The Court of Appeal's Second Decision**—A second appeal was then heard by the United States Court of Appeals for the District of Columbia Circuit. *Consolidated Gas Company of Florida, Inc. v. Federal Energy Regulatory Commission,* No. 88-1321 (D.C. Cir. March 8, 1989). In an unpublished opinion, the Court rejected the Commission's argument that to treat Consolidated differently under Tariff II amounted to presumptive discrimination. The Court noted:

> This position contradicts, without explanation, the one set forth in the Commission's **Statement of Lateral Line Policy in Rate Schedules Filed by Natural Gas Pipeline Companies,** which asserts that '[t]here is nothing inherently objectionable in a policy statement which creates separate sets of criteria with respect to new and existing purchasers . . .' 40 F.P.C. 46, 48 (1968).

Consolidated v. FERC, No. 88-1321, slip op. at 4 (D.C. Cir. March 9, 1989). Nevertheless, the Court accepted a rationale offered by FERC counsel at oral argument that only in a period of expansion should a transmission pipeline pay for the necessary lateral construction in seeking additional customers. If the pipeline was functioning at capacity, said Commission Counsel, then a new customer would not bring any benefit to the system, therefore the costs should be borne by the customer even though the pipeline's tariff did not impose such a requirement. *Id.*

Petitioner's arguments that the Commission's order was anti-competitive, Petitioner's Opening Brief at 26-30, and Petitioner's Reply Brief at 15-17, *Consolidated Gas Company of Florida, Inc. v. Federal Energy Regulatory Commission,* No. 88-1321 (D.C. Cir. March 9, 1989), were ignored by the court of appeals although the issue was before the court.

Consolidated's Petition for Rehearing was denied without opinion on May 17, 1989.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on March 9, 1989. Consolidated's petition for rehearing, filed April 24, 1989, was denied without opinion on May 17, 1989. This petition for a writ of certiorari was filed within 90 days of the latter date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case arises under the Natural Gas Act §§ 4, 7 and 19, 15 U.S.C. § 717 (1982); the Commission's Regulation General Terms and Conditions § 154.39, 18 C.F.R. § 154.39 (1988), and the Administrative Procedure Act, 5 U.S.C. § 706 (1982). The statutory provisions are included in Appendix I to the petition.

STATEMENT OF THE CASE

The underlying factual issue in the instant case is a dispute over who should be required to pay for a connecting, or "lateral," natural gas pipeline between the supplier, FGT, and the wholesale purchaser, Consolidated. Consolidated has consistently argued throughout the proceedings that for Consolidated to pay for the lateral would be unduly burdensome and anticompetitive. The FERC has nevertheless required Consolidated to pay the cost of the lateral, even though this cost amounts to nearly half of Consolidated's net investment in its plant and would be beyond Consolidated's ability to support.

As a result of this condition imposed upon Consolidated by FERC, Consolidated has been denied access to natural gas. This denial has forced Consolidated to continue to distribute high-cost propane gas to its customers, which must be shipped to Consolidated by truck. Under these circumstances, Consolidated has lost a significant portion of its customers to its competitor, City Gas. City Gas has eleven laterals with FGT, all of which have been provided at FGT's expense.

Indeed, City Gas intervened in the administrative proceeding between Consolidated and the FERC, and argued that Consolidated should be denied access to natural gas, that City Gas should be allowed to take over Consolidated's customers, and that Consolidated should either sell its system to City Gas at a fraction of its value, or simply be driven out of business. City Gas then extended its line through Consolidated's territory, captured all of Consolidated's commercial, as well as some of Consolidated's residential, customers, and City Gas further refused to transport natural gas for Consolidated at a reasonable price.

In response to City Gas' actions Consolidated initiated a separate action in the United States District Court for the Southern District of Florida against City Gas, in which Consolidated asserted that City Gas' actions violated the Sherman Act. The district court held that City Gas was in violation of the Sherman Act, and, in addition, the court found that the FERC's conditions imposed upon Consolidated created an insurmountable barrier to access to a natural gas supplier, and was therefore anticompetitive.

Despite the district court's findings, the FERC has refused to acknowledge the antitrust implications of its position with respect to Consolidated, and, in upholding the

commission, the United States Court of Appeals for the District of Columbia Circuit also has failed to acknowledge the irreconcilable conflict between the district courts finding and the FERC's condition.

REASONS FOR GRANTING THE WRIT

The essential issue in this case is that a district court's finding of fact, in an opinion after a full trial, that an administrative agency's position is in violation of Federal antitrust law, must be addressed by the agency in making any further decisions in the matter, and the appellate courts in reviewing those decisions cannot ignore the district court's findings.

An agency, and a court reviewing an agency decision, cannot ignore a relevant ruling in an antitrust case holding that the agency decision is an insurmountable obstacle to competition. The Supreme Court has consistently held that Federal regulatory agencies *must* consider anti-trust policy in rendering decisions to evaluating public convenience and necessity or the public interest. *McLean Trucking Co v. United States*, 321 U.S. 67 (1944); *California v. FPC*, 369 U.S. 482 (1962); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *FMC v. Svenske Amerika Linien*, 390 U.S. 238 (1968); *Northern Natural Gas v. FPC*, 399 F.2d. 953 (D.C. Cir. 1968). If the matter pending before the agency has serious anti-competitive effects, that aspect must be outweighed by compelling public interest factors before the agency can issue a certificate or license authorizing or requiring an action to be taken. *Northern Natural Gas Company v. FPC*, 399 F.2d. 953, 960-1, 977 (D.C. Cir. 1968); and see *Municipal Elec. Ass'n of Mass. v. FPC*, 414 F.2d. 1206 (D.C. Cir. 1969); *cf. United States v. First City Nat'l Bank of Houston*, 386 U.S. 361, 369 (1967). This obligation extends to FERC which is mandated in administering § 7 of the Natural Gas Act, 15 U.S.C. § 717 (1982), to give consideration to the

policies of the Clayton and Sherman Anti-Trust Acts. *California v. FPC*, 369 U.S. 482; *Northern Natural Gas v. FPC*, 399 F.2d. 953. The FERC must examine the implications of its approval of any pipeline expansion or tariff to ascertain whether the ultimate effect of that action is anti-competitive. *Central Iowa Power Cooperative v. FERC*, 606 F.2d. 1156, 1162, 1163 (D.C. Cir. 1979). If the action is evaluated as anti-competitive, then it cannot be approved.

In *Gulf States Utilities v. FPC*, 411 U.S. 747, 760 (1973), the Court stated:

> Consideration of antitrust and anticompetitive issues by the Commission moreover, serves the important function of establishing a first line of defense against those competitive practices that might later be the subject of antitrust proceedings.

Had the Commission been mindful of this threshold responsibility, the ultimate monopolistic damage quantified in *Consolidated Gas Company of Florida, Inc. v. City Gas Company of Florida, Inc.*, 665 F.Supp. 1493 (S.D. Fla. 1987), might not have occurred and most certainly would have been mitigated.

But in this case, FERC not only failed to carry out its mandated role, it affirmatively violated statutory standards by incorporating an anticompetitive condition in its order. By imposing the heavy cost of the lateral upon Consolidated, the Commission severely prejudiced Consolidated's efforts to regain customers lost to its competitor, City Gas, during the prolonged administrative proceeding. The Commission's action in imposing the cost of the lateral upon Consolidated instead of FGT, failed to protect Consolidated as required by **Northern Natural**, thereby enabling City Gas to maintain its virtual monopoly power in the relevant market area.

The Commission alluded to an illusory anti-competitive dilemma in its opinion No. 225-C and Order Denying Rehearing stating:

> We need not inquire into potential damages to Consolidated's competitors because the discrimination would be patent on its face.

42 FERC § 61,271, at 61,854 (1988). But the Commission failed to consider the very real anti-competitive effects of its own order imposing the heavy burden of the lateral cost on Consolidated.

The Commission's action of imposing the cost of the connecting lateral on Consolidated, when the competing dominant seller in the area, City Gas, had received numerous supply laterals at the pipeline's expense, severely prejudiced Consolidated's competitive position. Under the Commission's order Consolidated would have to pay not only the cost of its own lateral, but also its share of the cost of City's numerous laterals which are incorporated in FGT's cost of service. Therefore Consolidated's competitor was put at a distinct advantage; its rates do not reflect the construction cost for the laterals it received nor will its customers have to shoulder the burden of the system's cost of a new lateral, whereas Consolidated's customers must bear both.

The concept of a "level playing field" on which competitors can compete on equal terms has been adopted time and again by the Commission. The Commission, in the past, has found some of FGT's tariff provisions to be in conflict with basic anti-trust acts. *Florida Gas Transmission Co.*, 47 F.P.C. 341, 377-8 (1972). Where a pipeline's tariff contains a provision that unduly restricts the market area of a local distributor the Commission has ordered such a provision stricken from the tariff. *City of Florence, Ala. v. Tennessee Gas Pipeline Co.*, 24 FERC ¶ 61,395 (1983). Yet the Commission's ruling in this case tipped the

playing field radically against Consolidated and gave its competitor an unfair advantage. Far from demonstrating that allowing Consolidated to receive its lateral at the pipeline's expense would grant a cost advantage to Consolidated and do competitive harm to City Gas, the facts demonstrate that imposing the cost of the lateral on Consolidated will inflict significant competitive harm on Consolidated.

These anti-competitive implications have been ignored by FERC and the U.S. Court of Appeals for the District of Columbia in refusing to directly address or rule on these grounds. However, in the related case, *Consolidated v. City Gas*, 665 F.Supp. 1493, the Court expressly and unequivocably determined that Consolidated fell victim to anti-competitive practices as a direct result of the Commission's order.

In failing to address the issue of competititon, both the Court of Appeals and FERC have not only encouraged prohibited anti-competitive activity, but have also placed themselves in direct conflict with the findings of the Florida federal court.

Although the anti-competitive aspect of requiring Consolidated to pay for the connecting lateral and meter station was raised before the Commission and the Court in the initial and the second appeal, the primary argument was addressed to the tariff itself. Very simply, FGT's basic tariff, Section 5, stated that FGT would install, own and operate the meter station at the point of delivery (elsewhere defined as the "city gate") "except as provided in Section 14." The referenced Section 14 specifically required only "existing customers" to pay for any new laterals that they receive. FGT's witness testified that the "intention" was to require all customers to pay the cost of laterals and speculated that a new tariff sheet was required to express that intention. (JA 30-33). Consolidated argued throughout that the express tariff language was control-

ling and did not require Petitioner to pay for the lateral to the city gate and the meter station, and that the tariff could not be "interpreted" to require all customers to pay for lateral costs because the FGT tariff did not contain the language expressly required by § 154.39(b) of the Commission's Regulation General Terms and Conditions, 18 C.F.R. § 154.39(b) (1988), if that was FGT's intended policy.

This Honorable Court is not asked to review the issue of interpretation of the tariff, nor the complex issue of undue discrimination. The sole question to this Court is: Under prevailing law, if a U.S. District Court in a litigated antitrust proceeding between two competing retailers finds that an agency action creates such an obstacle to one retailer's access to a supply of the product it requires that it is compelled to seek its supply through its competitor, which then demands a monopolistic price for the product, is the agency required to re-examine its action and to find that an overwhelming public necessity justifies imposing the anticompetitive condition in the order?

The answer, under long standing precedent is that the agency must weigh the anticompetitive impact of its order and find that some dominant public necessity requires the action. No such consideration was given by the Commission.

CONCLUSION

Wherefore, the Court should order that the Commission's decision be vacated and the matter remanded with instructions that the Commission consider the anticompetitive effect of its order, as determined by the United States District Court in the related case of *Consolidated Gas Company of Florida, Inc. v. City Gas Company of Florida, Inc.*, 665 F.Supp. 1493.

Respectfully submitted,
Consolidated Gas
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